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APR 21 1997

Federal Communications Commission  
Office of Secretary

21st CENTURY RADIO VENTURES, INC.  
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SANTA MONICA, CA 90401  
310-393-2741 (telephone)  
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April 18, 1997

DOCKET FILE COPY ORIGINAL

Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

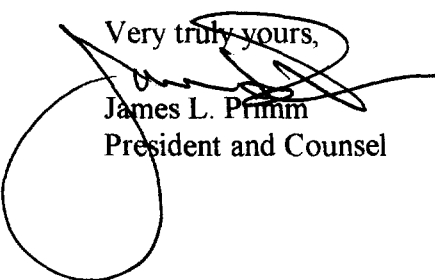
By Hand

re: Petition for Partial Reconsideration In the Matter of Amendment of Section 73.202(b), Table of Allotments, FM Broadcast Stations (Littlefield, Wolfforth and Tahoka, Texas) MM Docket No. 95-83 RM-8634

Please find enclosed an original and four copies of the above referenced pleading.

Also enclosed is a file stamped copy. Please file stamp and return the copy marked "Stamp and Return".

Very truly yours,

  
James L. Primm  
President and Counsel

No. of Copies rec'd  
List ABCDE

054

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

**RECEIVED**

**APR 21 1997**

Federal Communications Commission  
Office of Secretary

In the Matter of

Amendment of Section 73.202(b),  
Table of Allotments,  
FM Broadcast Stations  
(Littlefield, Wolfforth and  
Tahoka, Texas)

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**MM Docket NO. 95-83**  
**RM-8634**

**PETITION FOR PARTIAL RECONSIDERATION**

21st Century Radio Ventures, Inc. ("Petitioner"), pursuant to Section 1.106 of the Commission's rules, hereby respectfully submits this Petition for Partial Reconsideration of the Report and Order issued in the above captioned proceeding. As set forth in detail herein, Petitioner requests that the Commission reconsider its decision not to take action with respect to the deletion or, alternatively, substitution of channel 237A at Tahoka, Texas and that if the Commission should so decide to take such action that it substitute channel 278A for channel 237A at Tahoka, Texas which will result in a preferential arrangement of allotments as it will permit the citizens of Tahoka to receive their second local service while at the same time permitting a much larger number of people to receive Petitioner's station.

**1. Procedural History.**

Petitioner filed a Petition for Rule Making proposing the reallocation of Channel 238C3 from Littlefield to Wolfforth, Texas, and the modification of Petitioner's construction permit for KAIQ (FM) accordingly. To accommodate this reallocation,

Petitioner proposed to delete vacant channel 237A at Tahoka, Texas or, alternatively, to substitute channel 237A for channel 278A.

The Commission issued a Notice of Proposed Rule Making (10 FCC Rcd 6598) (1995) (the "NPRM") (attached hereto as Exhibit 1) and a Request for Supplemental Information (11 FCC Rcd 5770) (1996) (the "RSI") (attached hereto as Exhibit 2) in this proceeding. Petitioner filed comments in each proceeding.

In the NPRM, the Commission sought comments on Petitioner's proposed reallocation and sought expressions of interest in the vacant allotment of channel 237A at Tahoka, Texas. Comments and counterproposals were due by August 10, 1995 and reply comments were due by August 25, 1995. During the reply comment period Albert Benevides ("Benevides") filed an application for channel 237A (file number BPH-950824MC).

Petitioner filed a Petition to Deny the application of Benevides. Benevides opposed said Petition. On November 13, 1996, in a letter to Christopher D. Imlay, counsel for Benevides, (the "Tahoka Decision") the Commission (i) granted in part the Petition to Deny filed by Petitioner, and (ii) held in abeyance the application of Benevides pending the resolution of Docket 95-83. In a footnote, the Commission noted that if the Allocations Branch, Policy and Rules Division, Mass Media Bureau, deleted channel 237A, then Benevides' application would be returned. If it agreed to substitute channel 278A for channel 237A, then Benevides would be permitted to amend his application to specify the new frequency without loss of cut-off protection (footnote 4). A copy of the Tahoka Decision is attached hereto as Exhibit 3.

Benevides, by his attorneys, filed a Petition for Partial Reconsideration of the Commission's decision. A copy of Benevides' Petition for Partial Reconsideration is attached hereto as Exhibit 4.

On March 21, 1997, the Commission released its Report and Order in this proceeding (attached as Exhibit 5). In the Report and Order, the Commission denied the Petition of Petitioner and took no action on the issue of the deletion or substitution of channel 237A at Tahoka, Texas.

## **2. Request for Reconsideration of Deletion or Substitution of Channel 237A at Tahoka, Texas.**

Petitioner does not contest the Commission's action with respect to its change of city of license and wishes to move expeditiously to commence service to Littlefield, Texas. Petitioner has determined, however, that it must seek to modify its construction permit so as to specify a new transmitter site that will permit it to maximize its facilities and bring service to the greatest number of people possible. Petitioner's preferred site is short-spaced to allocated, but unbuilt, channel 237A at Tahoka, Texas. As a result, Petitioner requests that the Commission reconsider its decision not to take action with respect to the deletion or substitution of channel 237A at Tahoka, Texas. By substituting channel 237A for channel 278A, a preferential arrangement of allotments will occur as a second local service will be brought to Tahoka and Petitioner will be able to serve a much greater number of people.

### **3. Reconsideration Will Conserve Commission Resources**

Petitioner is currently preparing its Minor Change Application, Form 301, requesting a change in its transmitter site for KAIQ(FM). Such site is short spaced to channel 237A at Tahoka, Texas. In order to utilize such site, Petitioner must seek the deletion or substitution of channel 237A. In the ordinary course, Petitioner would file a Petition for Rule Making to modify the FM Table of Allotments so as to delete or substitute channel 237A. In this case, however, no such new Petition for Rule Making should be necessary because the Commission has already taken the identical steps during the pendency of the instant docket that it would take with respect to such a Petition .

The NPRM indicated that "[i]n accordance with Commission policy, if no party expresses an interest in use of Channel 237A at Tahoka, during the comment period in this proceeding, we shall delete the channel for lack of interest." 10 FCC Rcd at 6598. By giving the public notice and seeking expressions of interest in the channel, the Commission has therefore already accomplished what it might do if Petitioner were to instigate a new Petition for Rule Making in order to effectuate the deletion or substitution of Channel 237A.

In addition, the Commission has previously expended a number of years and many hours of staff time to allocate channel 237A. As noted in Petitioner's Petition for Rule Making filed in the instant proceeding, channel 237A was first allocated to Tahoka in 1984 in MM Docket 84-231. A construction permit was issued and subsequently assigned the call sign KZUB. KZUB was never constructed. Consequently the



construction permit was cancelled and the call letters deleted. The Commission again sought interest in the allocation of channel 237A on its own motion (Report No. CF-28), establishing a filing window which was closed on December 20, 1994. No one applied for the construction permit during the filing window. Given the long history of Channel 237A, it seems that further Commission requests for interest or applications would be duplicative and very wasteful of the Commission's time and resources.

Because the Commission has already taken every appropriate action that it would have to take to decide whether or not to delete or substitute channel 237A, it will conserve the Commission's resources to decide the issue as part of the instant proceeding. The Commission should therefore grant this petition for partial reconsideration for the limited purpose of substituting channel 278A at Tahoka for channel 237A.

#### **4. Substitution of Channel 278A For Channel 237A Will Result in a Preferential Arrangement of Allotments**

In the NPRM, the Commission asked for expressions of interest in channel 237A. Benevides filed an application for 237A just before the end of the Reply Comment period. In the Tahoka decision, the Commission noted that it would not permit Benevides to apply for channel 237A if the Commission chose to delete the channel, but that it would permit him to amend his application to specify channel 278A if it were substituted for 237A by the Commission.

Petitioner maintains that the Commission should substitute channel 278A for channel 237A because, together with Petitioner's proposed relocation of its transmitter



site, this will result in the a preferential arrangement of allotments.

Substituting channel 278A for channel 237A will mean that Tahoka will receive the benefit of a second local service. This will at the same time permit Petitioner to change its transmitter site to its preferred site where it can maximize its facilities and serve a dramatically greater number of people.

Petitioner's construction permit for its current site restricts it to an overall height of antenna structure equal to only 34 meters (maximum class C3 facilities may be up to 100 meters). Attached as Exhibit 6 is a copy of the construction permit for KAIQ(FM). Petitioner estimates that from its current site with its currently licensed facility, it will serve only 11,914 people. Even assuming maximum facilities at its current site, Petitioner will serve only 35,214 persons. By changing its site, Petitioner expects to maximize facilities and should serve 229,258 people.<sup>1</sup> Clearly, the public interest is best served by maximizing service to as many people as possible while maintaining quality service to Littlefield.

## **5. Conclusion**

Accordingly, Petitioner respectfully requests that the Commission reconsider and reverse, in part, the action of the Chief, Allocations Branch, Policy and Rules Division, Mass Media Bureau, with respect to its decision to not consider the deletion or substitution of channel 237A at Tahoka, Texas. The Commission is requested to

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<sup>1</sup>Petitioner notes that the same results with respect to KAIQ are available if channel 237A is deleted without a substituted channel. While the increased service made possible by such a deletion and KAIQ's proposed move is by itself sufficient to establish a preferential arrangement of allotments, Petitioner believes that greatest potential for a preferential arrangement of allotments will be to substitute channel 278A for channel 237A and thereby make it possible for both KAIQ to move its transmitter site and for Benevides to commence service to Tahoka.



substitute channel 278A for channel 237A at Tahoka which will result in a preferential arrangement of allotments as Tahoka will receive its second local service and Petitioner will be able to maximize its facilities and bring service to a substantially larger number of people.

Respectfully submitted,

21st Century Radio Ventures, Inc.

By: 

James L. Primm  
President and Counsel

21st Century Radio Ventures, Inc.  
530 Wilshire Blvd., suite 301  
Santa Monica, CA 90401  
310-393-2741

April 21, 1997



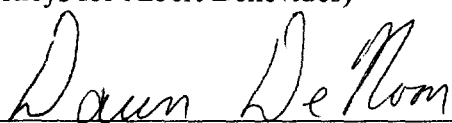
CERTIFICATE OF SERVICE

I, Dawn E. DeNoon, hereby certify that on this 21st day of April, 1997, I caused to be delivered by first class mail, postage pre-paid, copies of the foregoing "Petition for Partial Reconsideration" to the following:

Thoms M. Clark, Esq.  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
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Christopher D. Imlay, Esq.  
Cary S. Tepper, Esq.  
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Washington, D.C. 20036  
(Attorneys for Albert Benevides)

  
\_\_\_\_\_  
Dawn E. DeNoon

**EXHIBIT 1**  
**NOTICE OF PROPOSED RULE MAKING IN DOCKET 95-83**

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 95-83

In the Matter of

Amendment of Section 73.202(b), RM-8634  
Table of Allotments,  
FM Broadcast Stations.  
(Littlefield, Wolfforth and  
Tahoka, Texas)

NOTICE OF PROPOSED RULE MAKING

Adopted: June 8, 1995;

Released: June 19, 1995

Comment Date: August 10, 1995

Reply Comment Date: August 25, 1995

By the Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by 21st Century Radio Ventures, Inc. ("petitioner"), permittee of Station KAIQ(FM), Channel 238C3, Littlefield, Texas, requesting the reallocation of Channel 238C3 from Littlefield to Wolfforth, Texas, and the modification of its construction permit to specify Wolfforth as its community of license. Petitioner also requests the deletion of vacant Channel 237A at Tahoka, Texas, in the alternative, the substitution of Channel 278A for Channel 237A at Tahoka.<sup>1</sup> Petitioner states it will apply for Channel 238C3 at Wolfforth, if allotted.<sup>2</sup>

2. Petitioner seeks modification of Station KAIQ(FM)'s construction permit pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. Petitioner states that adoption of its proposal will result in a preferential arrangement of allotments by bring-

ing a first local aural transmission service to Wolfforth, while Littlefield will retain service from Station KZZN(AM). Petitioner notes that Wolfforth is an incorporated community with a population of 1,941 persons. Petitioner adds that Wolfforth is governed independently (Mayor and five council members) and hold elections for its own officials. Moreover, Wolfforth operates its own fire department and collects certain separate "ad valorem" property taxes. Petitioner states the reallocation will result in a dramatic increase in service to populated areas, with service increasing from 35,241 to 252,733 persons.<sup>3</sup>

3. We believe the proposal warrants consideration because the proposed reallocation of Channel 238C3 from Littlefield to Wolfforth, Texas, could provide the community with its first local aural transmission service. Further, the reallocation of Channel 238C3 to Wolfforth will not deprive Littlefield of its sole local aural transmission service or result in the reallocation of a channel from a rural community to one within an urbanized area. Channel 238C3 can be reallocated from Littlefield to Wolfforth, Texas, in compliance with the minimum distance separation requirements with a site restriction of 9.3 kilometers (5.8 miles) south to accommodate petitioner's desired transmitter site.<sup>4</sup> As requested, we also propose to modify petitioner's construction permit for Station KAIQ(FM) to specify Wolfforth as the station's community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept expressions of interest in the use of Channel 238C3 at Wolfforth or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

4. We shall also solicit comments on whether we should delete vacant and unapplied for Channel 237A at Tahoka, Texas. In accordance with Commission policy, if no party expresses an interest in use of Channel 237A at Tahoka, during the comment period in this proceeding, we shall delete the channel for lack of interest. However, if interest is expressed to retain Channel 237A and petitioner's proposal is adopted, we propose to substitute Channel 278A for Channel 237A at Tahoka. Channel 278A can be allotted to Tahoka in compliance with the minimum distance separation requirements with a site restriction of 5.6 kilometers (3.5 miles) northeast to accommodate petitioner's reallocation proposal.<sup>5</sup>

5. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

<sup>1</sup> Petitioner also suggests the allotment of Channel 240C3 at Littlefield, Texas, as a replacement for Channel 238C3. However, petitioner has not expressed an interest in applying for Channel 240C3 at Littlefield, therefore, we will not propose the allotment of the channel to the community.

<sup>2</sup> Although petitioner's request indicates that the original copy of its proposal was signed, petitioner failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and certifications. See also Amend-

ment of Section 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes, 5 FCC Rcd 3911, n.42 (1990). Petitioner is requested to rectify this omission in its comments.

<sup>3</sup> Petitioner states there will be a theoretical loss in service to 17,638 persons and denotes the loss is theoretical since Station KAIQ(FM) is unbuilt and has never been on the air. In addition, it advises that Station KAIQ(FM) was obtained on a first-come first-serve basis and as a result is not subject to any comparative hearing process restriction to change its community of license; citing, *Memorandum and Opinion and Order*, 5 FCC Rcd at 7097.

<sup>4</sup> The coordinates for Channel 238C3 at Wolfforth are North Latitude 33-25-48 and West Longitude 102-03-35.

<sup>5</sup> The coordinates for Channel 278A at Tahoka are North Latitude 33-11-34 and West Longitude 101-44-44.

## Federal Communications Commission

City	Channel No.	
	Present	Proposed
	<b>Option I</b>	
Littlefield, Texas	238C3	--
Wolfforth, Texas	--	238C3
Tahoka, Texas	237A	--
	<b>Option II</b>	
Littlefield, Texas	238C3	--
Wolfforth, Texas	--	238C3
Tahoka, Texas	237A	278A

*ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

## FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau

6. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

7. Interested parties may file comments on or before **August 10, 1995**, and reply comments on or before **August 25, 1995**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Primm  
21st Century Radio Ventures, Inc.  
713 Broadway  
Santa Monica, California 90401  
(Petitioner)

8. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

9. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an

## APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on

behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

**EXHIBIT 2**  
**REQUEST FOR SUPPLEMENTAL INFORMATION IN DOCKET 95-83**

Before the  
Federal Communications Commission  
Washington, D.C. 20554

MM Docket No. 95-83

In the Matter of

Amendment of Section 73.202(b), RM-8634  
Table of Allotments,  
FM Broadcast Stations.  
(Littlefield, Wolfforth and  
Tahoka, Texas)

**REQUEST FOR SUPPLEMENTAL INFORMATION**

Adopted: May 8, 1996; - Released: May 17, 1996

Comment Date: July 8, 1996

By the Chief, Allocations Branch:

1. The Commission adopted a *Notice of Proposed Rule Making*, 10 FCC Rcd 6598 (1995), in response to a petition filed by 21st Century Radio Ventures, Inc. ("petitioner"), permittee of Station KAIQ(FM), Channel 238C3, Littlefield, Texas, proposing the reallocation of Channel 238C3 from Littlefield to Wolfforth, Texas, and the modification of Station KAIQ(FM)'s construction permit to specify Wolfforth as its community of license. In order to accommodate this reallocation, the *Notice* also proposed either the deletion or substitution of the Channel 237A allotment at Tahoka, Texas.

2. As stated in the *Notice*, the petitioner seeks modification of Station KAIQ(FM)'s construction permit pursuant to the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's authorization to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest.<sup>1</sup> Petitioner contends that adoption of its proposal will result in a preferential arrangement of allotments by bringing a first local aural transmission service to Wolfforth, while Littlefield will retain service from Station KZZN(AM). Petitioner states that Wolfforth is an incorporated community that is governed independently by a Mayor and five council members. Furthermore, petitioner notes that reallocation will result in a dramatic increase in service to populated areas, with service increasing from 35,241 to 252,733 persons.

3. Based on the information before us, we are unable to determine whether petitioner's proposal would result in a preferential arrangement of allotments pursuant to the Commission's goal in adopting the change of community of license rule. See *Modification of FM and TV Authoriza-*

*tions to Specify a New Community of License (Memorandum Opinion and Order)* ("Community of License"), 5 FCC Rcd 7094 (1990). In *Community of License*, the Commission stated that it would not blindly apply the first local service preference of the FM allotment priorities<sup>2</sup> when a station seeks to reallocate a channel from a rural community to suburban community of a nearby urban area. As a result, the Commission has required stations that have sought to reallocate their channels and to modify their authorizations from rural communities to suburban communities within Urbanized Areas to make a showing that the suburban community warrants a first local service preference. Subsequently, we have reexamined our policy regarding reallocation proposals where a station seeks to reallocate its channel and modify its authorization from a rural community to another community that is located closer to but outside of an Urbanized Area. See *Headland, Alabama and Chattahoochee, Florida*, 10 FCC Rcd 10352 (1995). Consequently, we determined that stations seeking to move from rural communities to suburban communities located outside but proximate to Urbanized Areas must make the same showing that is currently required of stations seeking to move into Urbanized Areas if they would place a city-grade (70dBu) signal over 50% or more of the Urbanized Area. In this case, our engineering analysis indicates that Wolfforth (population of 1,941 persons) is about eight kilometers from the edge of the Lubbock Urbanized Area (population 187,906 person)<sup>3</sup> and the reallocated channel will provide a 70 dBu signal to half of the Urbanized Area. Based on our engineering finding of the city-grade coverage of this allotment, we request that petitioner submit information sufficient to show that Wolfforth is deserving of a first local service preference using the Commission's three factors enumerated in *RKO General (KFRC)*, 5 FCC Rcd 3222 (1990), and *Faye and Richard Tuck*, 3 FCC Rcd 5374 (1988). The Request for Supplemental Information does not afford any parties an opportunity to file counterproposals.

4. Interested parties may file comments on or before July 8, 1996. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

James L. Primm  
21st Century Radio Ventures, Inc.  
713 Broadway  
Santa Monica, California 90401  
(Petitioner)

5. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification That Sections 603 and 604 of the*

<sup>1</sup> The coordinates for Channel 238C3 at Wolfforth are 33-25-48 and 102-03-35.

<sup>2</sup> The allotment priorities are: (1) first full-time aural service; (2) second full-time aural service; (3) first local service; and (4)

other public interest matters [Co-equal weight given to priorities (2) and (3)]. See *Revision of FM Assignment Policies and Procedures*, 90 FCC 2d 88, 92 (1982).

<sup>3</sup> All population figures are taken from the 1990 U.S. Census.

*Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

6. For further information concerning this proceeding, contact Pam Blumenthal, Mass Media Bureau, (202) 418-2180. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

John A. Karousos  
Chief, Allocations Branch  
Policy and Rules Division  
Mass Media Bureau



**EXHIBIT 3**  
**COMMISSION DECISION CONCERNING APPLICATION OF JERRY BENEVIDES**  
**FOR CHANNEL 237A (THE "TAHOKA DECISION")**

## FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

NOV 13 1996

*In Reply Refer to:*  
**1800B3-MFW**

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James L. Primm  
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Santa Monica, CA 90401

In re: NEW(FM), Tahoka, Texas  
Albert Benavides  
File No. BPH-950824MC

Petition to Deny

Gentlemen:

This letter refers to the above-captioned application by Albert Benavides ("Benavides") for a new commercial FM station in Tahoka, Texas. On October 11, 1995, 21st Century Radio Ventures, Inc. ("21st Century") filed a petition to deny Benavides' application, to which Benavides filed an opposition on October 18, 1995. For the reasons set forth below, we will grant 21st Century's petition in part and hold Benavides' application in abeyance pending resolution of the pertinent rule making proceeding.

Background/Pleadings. On June 19, 1995, the Commission released the Notice of Proposed Rule Making in MM Docket No. 95-83, 10 FCC Rcd 6598 (M.M. Bur. 1995) ("NPRM"). In that proceeding, the Commission sought comments on 21st Century's proposal to reallocate Channel 238C3 from Littlefield, Texas, to Wolfforth, Texas, modify its license to specify Wolfforth, and delete then-vacant channel 237A in Tahoka.<sup>1</sup> This NPRM indicated that "[i]n accordance with Commission policy, if no party expresses an interest in use of Channel 237A at Tahoka, during the comment period in this proceeding, we shall delete the channel

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<sup>1</sup>Alternatively, 21st Century requested the substitution of Channel 278A for Channel 237A at Tahoka.

for lack of interest." *Id.*<sup>2</sup> Comments and counterproposals were due by August 10, 1995. Benavides filed his application on August 24, 1995.

In its petition to deny, 21st Century states that: (1) Benavides failed to file an expression of interest for Channel 237A during the rule making comment period, and his application should be returned; and (2) if Benavides' application is accepted, Channel 278A should be substituted for Channel 237A in Tahoka.

In opposition, Benavides states that the staff must process his application because neither the NPRM nor any other Commission Order imposed a "freeze" on the filing of applications for Channel 237A in Tahoka. Furthermore, Benavides states that his proposal was filed during the reply comment period; therefore, his application was not disruptive of the rule making proceeding because MM Docket No. 95-83 was not procedurally ripe for deliberation when he filed. Finally, Benavides points to a purportedly similar situation involving Channel 285A in Pawhuska, Oklahoma for which a deletion or, alternatively, a channel substitution was proposed. Benavides notes that the Notice of Proposed Rule Making in MM Docket No. 94-100 (Okmulgee, Nowata, and Pawhuska, Oklahoma), 9 FCC Rcd 4882 (M.M.Bur. 1994), the Commission indicated that, "should no party express an intention to apply for the [Pawhuska] channel in the context of this proceeding, we will delete the channel, without replacement, if the proposed channel changes for Okmulgee and Nowata are ultimately granted." *Id.* Comments in MM Docket No. 94-100 were due by November 7, 1994, and reply comments were due by November 22, 1994. Benavides states that Rhema Media filed an application (File No. BPH-941122MV) on November 22, 1994 for Channel 285A at Pawhuska, which was subsequently placed on a notice of acceptance on March 15, 1995.<sup>3</sup> Benavides states that the Commission must treat his application in a similar manner.

Discussion. In rule making proceedings in which the petition proposes to delete an allotment, the Commission's general policy is not to delete a channel where an expression of interest is demonstrated by the filing of an application by the initial comment deadline. *See, e.g., Notice of Proposed Rule Making* in MM Docket No. 94-84 (Driscoll, Gregory, and Robstown, Texas), 9 FCC Rcd 3580 (M.M.Bur. 1994). In this case, as noted, Benavides did not file his application until two weeks after the close of the comment period. It is therefore untimely and cannot be considered either as an expression of interest or as a counterproposal in MM Docket No. 95-83. *See Report and Order* in MM Docket No. 95-135 (Honor, Michigan), 11

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<sup>2</sup>On May 17, 1996, the Commission sought additional information regarding the alleged "first local service" preference claimed by 21st Century for the proposed Wolforth allotment. Request for Supplemental Information, 11 FCC Rcd 5770 (M.M. Bur. 1996). While interested parties were given until July 8, 1996 to file comments, the Commission specifically stated that "[t]he Request for Supplemental Information does not afford any parties an opportunity to file counterproposals." *Id.*

<sup>3</sup>The application ultimately was granted on February 21, 1996, but only after the Report and Order in the MM Docket 94-100 proceeding, which ultimately adopted the channel substitution and not the deletion of the Pawhuska allotment, was final. *See Report and Order* in MM Docket No. 94-100, 10 FCC Rcd 12,014 (M.M. Bur. 1995), 60 Fed. Reg. 56,532 (November 9, 1995).

FCC Rcd 5301(MM. Bur., 1996), citing Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments, 7 FCC Rcd 4917 (1992), recon. granted in part, 8 FCC Rcd 4743 (1993). We note that in the Pawhuska proceeding, cited by Benavides for a contrary proposition, Rhema Media both filed comments during the comment period opposing the deletion of the Pawhuska allotment and subsequently filed its application for that frequency. The Commission took note of both circumstances in finding that there was an "expression of interest" in the Pawhuska allotment. Report and Order in MM Docket No. 94-100, 10 FCC Rcd at 12,016. Here, Benavides filed no timely comments opposing the deletion of the Tahoka allotment and only filed an application after the comment period had closed. The Pawhuska situation cited by Benavides is thus distinguishable from the instant case. Nonetheless, we believe it proper to withhold action on Benavides' application pending final action on 21st Century's rule making petition, as we did with Rhema Media's application in the Pawhuska proceeding.

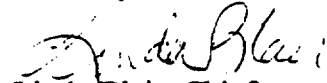
Were his proposal merely short-spaced to 21st Century's proposed channel substitution under 47 C.F.R. §73.207, Benavides would be provided an opportunity to amend to a non-conflicting site. Report and Order in MM Docket No. 95-135, 11 FCC Rcd at 5301. However, because Benavides' application is both short-spaced to the proposed Wolfforth allotment and conflicts with the proposed deletion of the Tahoka allotment, the application can only be amended to specify facilities consistent with MM Docket 95-83. We will therefore withhold action on Benavides' application until the anticipated Report and Order in MM Docket No. 95-83 is final.<sup>4</sup> This action is both consistent with our treatment of similarly situated applicants, see the Pawhuska, Oklahoma, situation discussed above, and will prejudice neither the applicant here nor the final determination in the Littlefield/Wolfforth/Tahoka rule making proceeding.

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<sup>4</sup>Should the Allocations Branch, Policy and Rules Division, Mass Media Bureau, substitute Channel 278A for Channel 237A in Tahoka rather than delete the Tahoka allotment altogether, Benavides will be permitted to amend his application to specify the new frequency without loss of cut-off protection. See Report and Order in MM Docket No. 94-100, 10 FCC Rcd at 1017 ¶21. Should the Tahoka allotment ultimately be deleted, Benavides' application will be returned. See, e.g., Letter to Douglas R. Salamanca (East Hemet, California, reference 8920-JR (Chief, Audio Services Division, Mass Media Bureau, March 28, 1991) (application returned when allotment deleted).

Accordingly, the petition to deny filed on October 11, 1995 by 21st Century Radio Ventures, Inc., IS GRANTED to the extent indicated herein and IS DENIED in all other respects, and the application (File No. BPH-950824MC) of Albert Benavides for a new commercial FM station on Channel 237A in Tahoka, Texas, IS HELD IN ABEYANCE until the determination in MM Docket No. 95-83 has become final.

Sincerely,



Linda Blair, Chief  
Audio Services Division  
Mass Media Bureau

cc: Albert Benavides

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**EXHIBIT 4**  
**JERRY BENEVIDES REQUEST FOR PARTIAL RECONSIDERATION OF THE**  
**TAHOKA DECISION**

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>Application of Albert Benavides</b>	)	<b>File No. BPH-950824MC</b>
	)	
<b>For Construction Permit For New</b>	)	
<b>FM Broadcast Station At Tahoka,</b>	)	
<b>Texas, on Channel 237A</b>	)	
 <b>To: The Chief, Mass Media Bureau</b>		

**PETITION FOR PARTIAL RECONSIDERATION**

Albert Benavides (Benavides), by counsel and pursuant to Section 1.106 of the Commission's Rules (47 C.F.R. §1.106), hereby respectfully submits his Petition for Partial Reconsideration of the November 13, 1996 action of the Chief, Audio Services Division, which:

(1) granted in part a Petition to Deny the above-captioned application, which Petition to Deny was filed by 21st Century Radio Ventures, Inc. (TCRVI); and (2) held the above-captioned application in abeyance pending the resolution of MM Docket 95-83, which could potentially cause the withdrawal of the allocation of FM Channel 237A at Tahoka, Texas, specified in the Benavides Application. As good cause for his reconsideration request, Benavides states as follows:

1. Attached hereto as Exhibit A is a copy of the November 13, 1996 letter of the Chief, Audio Services Division, Mass Media Bureau (1800B3-MFW), which is self-explanatory. The facts are correctly stated. Simply, TCRVI filed a petition for rule making, RM-8634, proposing

to delete FM Channel 237A at Tahoka, Texas, so as to permit the reallocation of Channel 238C3 from Littlefield, Texas to Wolfforth, Texas. TCRVI also asked that its construction permit for KAQI(FM), Littlefield, Texas, be modified to specify operation on Channel 238C3 at Wolfforth, Texas.

2. The dates specified on the NPRM for comments were August 10, 1995 for comments, and August 25, 1995 for reply comments. According to the Notice, at Paragraph 4:

We shall also solicit comments on whether we should delete vacant and unapplied for Channel 237A at Tahoka, Texas. In accordance with Commission policy, if no party expresses an interest in use of Channel 237A at Tahoka during the comment period in this proceeding, we shall delete the channel for lack of interest. However, if interest is expressed to retain Channel 237A and petitioner's proposal is adopted, we propose to substitute Channel 278A for Channel 237A at Tahoka. Channel 237A can be allotted to Tahoka in compliance with the minimum distance separation requirements with a site restriction of 5.6 kilometers (3.5 miles) northeast to accommodate petitioner's reallocation proposal.

3. During the comment period (i.e. prior to the close of the reply comment period), specifically August 24, 1995, Benavides filed his application for Channel 237A at Tahoka. Though the Chief, Audio Services Division, refers in the November 13, 1996 letter to a Commission policy "not to delete a channel where an expression of interest is demonstrated by the filing of an application by the initial comment deadline", that "initial comment deadline" requirement does not appear in the instant rulemaking proceeding. In fact, Benavides filed timely during the "comment period" in this proceeding, as called for by the plain wording of the Notice, and Benavides maintains his interest in his pending application as filed. **There is no authority for the claim that an expression of interest in an existing channel (as opposed to a counterproposal filed in a rulemaking proceeding) must be filed by the comment date rather than prior to the reply comment date in an allocation rulemaking proceeding.**



Accordingly, the statement made by the Chief, Audio Services Division, that "Benavides did not file his application until two weeks after the close of the comment period" is absolutely false; Benavides filed before the close of the comment period.

4. The Audio Services Division misconstrues Commission precedent with regard to the filing of applications which conflict with proposals to alter the Table of Allotments. It posits that the Benavides application constituted a counterproposal to the proposed rulemaking and that it is therefore untimely because it was filed after the close of the initial comment period. However, that analogy is inappropriate under the present circumstances. While it is indisputably true that counterproposals must be filed by the initial comment deadline in a rulemaking proceeding, *see* Report and Order, *Honor, Michigan*, 11 FCC Rcd 5301, 5301 ¶4 (MMB 1996), *citing Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments*, 7 FCC Rcd 4917 (1992), *recon. granted in part*, 8 FCC Rcd 4743 (1993), the filing of a counterproposal by definition proposes to further change the status quo. It is tantamount to any other comment to which opposing parties must have the opportunity to reply.

5. The Benavides application (like any application submitted *during* the pleading cycle of a proposal to alter the Table of Allotments), however, does not constitute a counterproposal. Because it was submitted during the pendency of the rulemaking, it *automatically* serves notice of interest in the subject channel. Thus, it does not act as a counterproposal, but merely confirms interest in use of a channel *which has already been allotted*. The Commission, in the Notice of Proposed Rule Making below, stated "if no party expresses an interest in use of Channel 237A at Tahoka, *during the comment period in this proceeding*, we shall delete the channel for lack of interest." (*italics added*). This statement merely verbalizes the logical proposition that,